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No. 504

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

CHARLES ALLEN TAYLOR,

Petitioner,

v.

NEIL McELROY, A. TYLER PORT,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinion Below

The opinion and judgment of the District Court are not reported; they appear at pages 473-476 of the Record. No opinion or judgment has been rendered by the Court of Appeals (R. 479); the decision of the Court of Appeals in the related case of *Greene* v. *McElroy*, No. 180, is reported at 254 F. 2d 944.

Jurisdiction

Summary judgment was entered against petitioner by the United States District Court for the District of Columbia on October 14, 1958 (R. 475). Petitioner docketed his appeal in the Court of Appeals for the District of Columbia Circuit on October 16, 1958 (R. 477). The petition for a writ of certiorari before judgment in the Court of Appeals was filed in this Court on November 8, 1958; the petition was granted on December 15, 1958 and the case was assigned for argument immediately preceding No. 180 (R. 480). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the federal courts are powerless to afford redress against the arbitrary denial of clearance for access to classified defense information based solely on accusations by faceless informants neither confronted by nor known to either petitioner or the Hearing Board, where such denial results in the termination of employment and the curtailment of means of livelihood.

2. Whether, if power to afford redress exists in the federal courts, it is consistent with statutory authority and the due process clause of the Fifth Amendment for the Government to deny clearance for access to classified information solely on the basis of accusations by faceless informants neither confronted by nor known to either petitioner or the Hearing Board.

Statutes and Regulations Involved

Paragraph 4 of the Industrial Personnel Security Review Regulation provides as follows: [1]

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[1] 20 Fed. Reg. 3, 32 CFR Part 67 (Supp. 1958), Section 67.1-4.

> "*Release of Information.* All personnel in the Program will comply with applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives, or to any other person not authorized to have access to such information . . ."

The statutes and Executive Order upon which the Government apparently relies as its authority for the Industrial Personnel Security Review Program and its no-confrontation hearing system are set forth in Appendix A (*infra*, p. 62).

Statement of Facts

Petitioner was employed from 1941 until 1956 as a tool maker at Bell Aircraft Corporation, Buffalo, New York (R. 2, 29-30). On September 6, 1956, without advance notice or intimation of any sort to petitioner, the Office of Industrial Personnel Security Review of the Defense Department dispatched a letter to the company suspending any and all clearances for access to classified defense information then held by petitioner (R. 34). Because of this suspension of clearance and since petitioner's work as a tool maker required access to classified defense information, petitioner was forthwith discharged by the company on September 11, 1956, and rendered unable to obtain employment sufficient for means of livelihood (R. 30, 33-34, 40-41).

Shortly after his discharge, petitioner received from the Office of Industrial Personnel Security Review of the Defense Department a "Statement of Reasons," dated

September 10, 1956, for the suspension of his clearance for access to classified defense information (R. 38). This 1956 Statement of Reasons charged that in 1942 and 1943 petitioner had been a member of, paid dues to, and held a membership card in, the Communist Party and "*may still have membership in the Communist Party*" (R. 38). Petitioner promptly entered a categorical sworn denial of the charge and submitted a "Notice to Produce" asking to be informed of the names and addresses of the persons upon whose information the charges in the Statement of Reasons were based and to inspect the original or a copy of the Communist Party membership card, as well as a Communist Party transfer card also referred to in the Statement of Reasons (R. 42, 49-50).

On November 1, 1956, petitioner appeared at a "hearing" before the Defense Department's New York Industrial Personnel Security Hearing Board to defend himself against the charge of Communist affiliation some 13 or 14 years earlier (R. 125). At the outset of the "hearing," the Board made clear that, in accordance with paragraph 4 of the governing Regulation (p. 3, *supra*), it would produce no evidence in support of the charge of Communist affiliation nor even inform petitioner of the names of his accusers (R. 18, 126-130). Although the Chairman of the Board admitted at the outset of the hearing that the Board did not have the alleged Communist Party membership card and Communist Party transfer card in its possession (R. 130) and although he refused to reveal who, if anybody, had possession of the alleged cards (R. 131), he nevertheless stressed the Board's "*intention . . . to consider that these documents exist*" (R. 131). Thereupon, notwithstanding the difficulty of proving the negative of facts presumed by the Board and particularly a negative concerning years long past, petitioner undertook and accom-

plished the task of showing the utter implausibility and falsity of the charge against him.

Petitioner, assuming the burden of proving his innocence, testified under oath that he had never been a member of, paid dues to, held a card in, or aided or abetted, the Communist Party in any manner (R. 353-413). He not only gave categorical sworn denials to the charge of Communism and each facet thereof, but he demonstrated his continuous public opposition to the Communist Party program and the Communist Party leaders in his local union both during the years in question and continuously thereafter (*ibid*). In particular, petitioner stressed his repeated 1942-1943 public statements opposing the firm Communist Party line on incentive pay and a complete no-strike pledge (R. 362-3, 386). Lengthy cross-examination by the Board and its counsel served only to reinforce petitioner's testimony (R. 369-405, 409-412).[2]

Eleven additional witnesses took the stand to demonstrate under oath that the charges were patently implausible and wholly false. Petitioner's son, Eugene Taylor, and ten employees of the Bell Aircraft Corporation, most of whom presently hold security clearances at Bell and all of whom have worked with and known petitioner during the fifteen years of his employment there, testified that petitioner had never discussed Communism or the Communist Party favorably; had no Communist books, literature or friends; and was regarded by witnesses and others active in the local UAW union as "an independent thinker, and . . . not a Com-

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[2] For example, the Board's repeated efforts to tie petitioner to the Communist Party by questioning him about a list of persons apparently known to the Board as Buffalo-area Communists only indicated anew petitioner's absence of Communist affiliation for he was totally unacquainted with these people (R. 373-378, 383, 395-397, 411-412). The Board's persistent, though futile, cross-examination of petitioner was especially ironic in view of its failure to make the secret informants available for any examination whatever.

munist. Now or ever" (R. 134-352, 178). In the words of one witness, Thomas Smith, "if Russia or any foreign country invaded this country, Taylor would be the first guy to get shot fighting them. That's the kind of guy he is, to me . . . He's a real, 100 per cent American" (R. 324).

These eleven witnesses not only proved petitioner's *non-Communism;* they also proved his *anti-Communism* during the very period that faceless informants allege his Party membership. The Communist Party leader of petitioner's local UAW union in 1942-1943 was Allie Brodose. John Maturski, who defeated Brodose for the presidency of the local in 1943 on an all-out anti-Communist platform, testified that petitioner stood with him publicly in opposition to Brodose and the Communist Party program urged by Brodose (R. 197-231). Joseph Rosmyslowski testified that petitioner had frequently been publicly opposed to, and had become generally known as a bitter enemy of, Brodose; indeed he recalled an angry argument between petitioner and Brodose in 1942 or 1943 in which petitioner repeatedly referred to Brodose as a "red" (R. 158-176, 174). Leon Meyers recalled an incident in 1942 or early in 1943 when petitioner had warned him about associating with Brodose because "you know he's a Commie" (R. 287-288). Petitioner's 1942-43 consistent public opposition to Brodose personally and to the Communist Party platform urged by Brodose, was related to the Board from personal observation by all ten of the Bell Aircraft employees who appeared in his behalf (R. 158-60, 167-176, 203-204, 217, 224-227, 237, 245, 257-260, 264-265, 281, 286-288, 291, 300, 304, 311-313, 320-323, 335-336, 338-339, 348-349, 350-351). At least seven of these witnesses particularly stressed petitioner's public statements against incentive pay and the no-strike pledge (both central to Communist policy of the day) as clear proof of his anti-Communism (R. 159-60, 174, 204-206, 217, 258, 300, 311-313, 320-322, 335-336).

After three days of "hearing" before the Industrial Personnel Security Hearing Board, there was not a word in the record to support the charge against petitioner, but, on the contrary, only the testimony of twelve witnesses on direct and cross-examination showing the patent falsity and implausibility of the charge against him. Yet, notwithstanding this sworn record, the Office of Industrial Personnel Security Review on June 14, 1957 found "*true as stated*" the charge that the petitioner had been a member of, paid dues to, and held a membership card in, the Communist Party during 1942-43 (R. 52). On the basis of this incredible finding, petitioner's security clearance was denied as "not clearly consistent with the interests of national security" (*ibid*).

On November 22, 1957, petitioner appealed to the Secretary of Defense (R. 53-57), referring in his appeal to petitioner's outspoken opposition to the Communist Party policies of Brodose and suggesting the possibility of his having been confused with Brodose's ally, one Alvin Taylor (R. 53-57). Five months having elasped without action by the Defense Department on his appeal to the Secretary, petitioner, on April 24, 1958, filed this suit for injunctive and declaratory relief in the United States District Court for the District of Columbia seeking a review of the denial of his clearance without confrontation by his accusers (R. 1). On May 30, 1958, more than six months after petitioner's appeal to the Secretary of Defense and only after the institution of this action, the General Counsel of the Defense Department advised petitioner by letter that the case was being returned to the Hearing Board for unspecified "further proceedings" (R. 59-60). In so doing, however, the Defense Department stated that the former adverse determination against petitioner, based on the statements of the secret informants, "*was neither arbitrary nor capricious but was, on the contrary, reasonably supported*" (R. 60).

On June 19, 1958, the Hearing Board transmitted an Amended Statement of Reasons to petitioner (R. 68). The charge contained in this Amended Statement was substantially identical with the former charge in that it asserted that petitioner had been a member of, paid dues to, and held a membership card in the Communist Party in 1942-43. But there was one very real difference—the new charge, instead of alleging that petitioner had and "*may still have membership in the Communist Party*" (R. 38), now alleged that he had been *expelled* from the Communist Party in 1943, primarily because he had "opposed the 'no strike pledge' and 'incentive pay' policies supported by the Communist Party" (R. 70).[3] In addition, the Amended Statement, in a civil administrative "indictment" for perjury, charged petitioner with false testimony at his 1956 hearing in denying former Communist Party affiliation (R. 72-74). Petitioner immediately denied the amended charge under oath (R. 80), and pointed out through his counsel that "Mr. Taylor is the first American to be judged by a tribunal which accuses the defendant upon secret accusations of being untruthful in his assertions of innocence" (R. 79).

Now at long last, after two years of waiting, it appeared that petitioner might be confronted by his accusers. A hearing was scheduled for July 11, 1958, and petitioner appeared with counsel ready to face his accusers only to be told by the Board that no decision had yet been reached

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[3] The Amended Statement of Reasons had thus been made to fit the facts at the "hearing" in November, 1956; what petitioner had presented as his affirmative defense was now worked into the case against him as the reason for his "expulsion" from the Communist Party, an expulsion never before even mentioned. Only later, when the synopses of the secret informants' accusations were read into the record (see p. 9, *infra*), did petitioner learn that the secret informants had suddenly "remembered" his expulsion from the Party, tailoring their stories to fit the facts at the 1956 hearing and that the Amended Statement simply flowed from the amended stories of the informants.

on whether to grant him confrontation (R. 89). The hearing was continued (R. 94).

On August 1 the hearing was reconvened once again (R. 434). This time the Board flatly announced that it was not going to confront petitioner with his accusers: instead the Chairman read into the record six anonymous synopses of accusations of Communist affiliation in 1942-43 (R. 434-440, 102-104). Although the original charges in 1956 (based on the original information from the secret informants) had alleged that petitioner "*may still have* membership in the Communist Party" (R. 38), five of the six confidential sources now referred to petitioner's 1943 *expulsion* from the Communist Party;[4] one of the informants, in words reminiscent of petitioner's defense at the 1956 "hearing," even cited his "public statements against incentive pay and in favor of a strike policy" as grounds for the expulsion (R. 102). The Board refused to indicate whether it had ever examined the confidential informants, what if anything it knew about their past criminal or other records, and what degree of hearsay was involved in the assertions of the informants (R. 104-117). It was quite clear from the synopses themselves, however, that *the Board itself was forced to rely solely on second-, third- and fourth-degree hearsay assertions against petitioner by persons the Board itself never examined and that petitioner's accusers are not federal agents secreted in the Communist Party but merely casual informants engaged in private slander.*[5]

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[4] Four of the sources actually used the word "expelled" or "expulsion" (R. 102-103) and a fifth source referred to petitioner's name being on a list "favorable to the Socialist Workers Party" (R. 104), which the Amended Statement of Reasons alleged as one basis of petitioner's expulsion from the Communist Party (R. 68).

[5] Examples of the second-, third- and fourth-degree hearsay assertions before the Board are readily available in these synopses. For instance, one of the confidential sources is said to have furnished information "in substance showing that in or about July 1944 he had seen a list of names in the possession of a member of the Buffalo branch, Socialist

Petitioner having been denied confrontation again and again, it was now apparent that his appeal to the Secretary of Defense had produced nothing but a fruitless nine-month delay of legal redress. Thereupon, on September 12, 1958, petitioner filed in the District Court a Motion for Summary Judgment to which respondents cross-moved. A few minutes before the October 14th argument in the District Court on these motions, counsel was informed that petitioner had once again, on October 13, 1958, been finally denied security clearance. On that date the Defense Department for the second time made a final administrative determination finding petitioner a security risk and deny-

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Workers Party, of persons favorable to the Socialist Workers Party . . . and that this list contained the name Charles Taylor" (R. 104). Thus the Board was permitted to draw inferences concerning the charge of petitioner's Communist Party membership from 1) an unknown person's preparation of a list of persons "favorable to the Socialist Workers Party" which was 2) seen by an unnamed informant in the possession of 3) yet another unknown person, all of which was told presumably 4) to a governmental agent and 5) ultimately transmitted to the Hearing Board.

Moreover the Board's refusal to answer the question whether it had itself examined the confidential informants (R. 106) can only be interpreted as an admission that the customary practice had been followed of withholding the names of the informants even from the Board, thus rendering impossible any examination of the informants by the Board (see p. 33, *infra*). The Government did not suggest the contrary in its Memorandum on the petition for certiorari.

Finally, the synopses also make clear that petitioner's accusers are not federal agents secreted in the Communist Party but merely casual informants. For example, the fourth confidential source was obviously a fellow worker at Bell (R. 103) and, to a greater or lesser degree, the synopses make quite clear that all the adverse information was derived from the "recollection" of private informants about events long past (R. 102-104). Furthermore, had the information concerning petitioner come from Government agents infiltrating the Communist Party while petitioner was allegedly a member, we cannot conceive of the Government's delaying security proceedings against him from 1942 or 1943 until 1956. Clearly, not undercover agents but merely casual informants are involved; one cannot believe that professional agents would first have reported that petitioner may still be a member of the Communist Party and then later have asserted his expulsion from the Party in 1943.

ing him access to secret information (R. 120-124). The Department found the basic charges of Communist affiliation "*true as stated*" and particularly found that petitioner had "deliberately and knowingly" made "false or misleading" denials of such Communist affiliation (R. 122-123). As a result of this latest administrative action of October 13th, the Government on the following day formally withdrew in District Court its prior contention that petitioner had failed to exhaust his administrative remedies (R. 459). The District Court, although "concerned about the administrative proceedings" (R. 473-474), entered summary judgment for the Government (R. 475).

On November 8, 1958, the petition for certiorari was filed. On December 8, 1958, less than two months after petitioner, on the basis of information from secret informants, had been finally determined to be a security risk and to have committed perjury in denying Communist Party affiliation, the Solicitor General informed this Court that the case was the subject of review "by the Departments of Defense and Justice." On December 15, 1958, this Court granted certiorari and assigned the case for argument immediately preceding *Greene* v. *McElroy*, No. 180 (R. 480).

On December 31, 1958, the Acting Secretary of Defense found that the "clearance of Charles Allen Taylor is in the *national interest*." As unusual as was this sudden and belated about-face, even more unprecedented was the failure of the Secretary to make the prescribed determination that petitioner's clearance was "clearly consistent with the interests of the *national security*" (Industrial Personnel Security Review Regulation, Section 20e) and his failure to issue findings on each of the charges against petitioner, notwithstanding the fact that the Department's own Regulation requires that all security determinations "shall include a finding with respect to each of the allegations

set forth in the Statement of Reasons" (Industrial Personnel Security Review Regulation, Section 20d).

On January 5, 1959, petitioner's attorney sent a telegram to the Secretary of Defense requesting the issuance of the required findings and specifically asking for findings (1) reversing all the earlier findings, (2) withdrawing the false charges, (3) announcing that Mr. Taylor had never been a member of the Communist Party, never paid Communist Party dues, never attended Communist Party meetings, etc., and (4) establishing that he has been truthful in so asserting.[6] The only response to this telegram was a letter of January 6, 1959, from the Department's General Counsel rejecting *sub silentio* petitioner's request for affirmative findings and merely stating that "The language of the order of December 31, 1958, which reads '. . . hereby superseding all previous orders in this case' completely expunges all previous findings in this case, as if they had never been rendered." Thereupon, on January 10, 1959, petitioner's attorney addressed another telegram to the Secretary of Defense referring to the "unresponsive" nature of the January 6th reply and again requesting the issuance of exculpatory findings that petitioner had never been a Communist Party member and that his denial of such membership had not been perjurious. No response has been received.

Meanwhile, on January 9, 1959, the Government filed its "Memorandum for the Respondents Suggesting That The Cause Is Moot." On January 28, 1959, petitioner filed his "Opposition" to this "Suggestion" and requested either that the Government's suggestion of mootness be denied or, if the question of mootness be deemed worthy of further consideration, that the determination be deferred

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[6] This telegram, and the subsequent correspondence referred to in this paragraph, are set forth in full in Appendix B to petitioner's "Opposition to Government's Suggestion of Mootness," p. 33.

until after the Court has had the benefit of the oral arguments. On February 13, 1959, the Government filed a further detailed Memorandum on the issue of mootness, but failed to address itself in any way to petitioner's suggestion that this issue requires at the very least full argument before the Court. As this brief is being filed, petitioner's request for a postponement or denial of the suggestion of mootness is pending before the Court.

Petitioner is now employed by Bell Aircraft under the cloud of two and a half years of grave charges and without the benefit of findings clearing him of those charges or repudiating the assertions of the six secret informants. Indeed, petitioner has already once more been required to fill out personnel security questionnaires, including questionnaires concerning past Communist affiliation, which are the first steps in the standard security clearance procedure to which petitioner is now apparently once more being subjected. Only the requested injunctive and declaratory relief can protect petitioner from a continuance of this endless story of what can happen to an American citizen once he is caught in the clutches of a security program predicated on the changing stories of faceless informants.

SUMMARY OF ARGUMENT

I

This Court has consistently held confrontation to be a minimum requirement of the procedural due process imposed on all governmental action affecting substantial interests. The Defense Department's Regulation barring confrontation affects substantial interests of petitioner and brings into play the safeguard of procedural due process under the Fifth Amendment. If the interest in public employment is sufficiently substantial to invoke due process protection (*Wieman* v. *Updegraff*, 344 U.S. 183,

192), certainly the interest in private employment is *a fortiori* sufficient. *Truax* v. *Raich*, 239 U.S. 33, 41. Where, as here, petitioner's job, his means of livelihood and his reputation are all at stake, governmental action must accord with procedural due process. Whatever rare and grudging exceptions to the requirement of due process this Court may have recognized in isolated decisions in the past, none of the interests involved in those cases rise to the dignity and substantiality of the interests here under consideration.

The fair hearing imposed whenever substantial interests are at stake by this universal concept of procedural due processes encompasses the opportunity to know, examine, explain and rebut all the contrary evidence. More particularly, such a hearing includes the unqualified right to be confronted with all adverse witnesses and to subject them to cross-examination. That right has been fully and consistently recognized by this Court in terms that permit no limitation. *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93; *Morgan* v. *United States*, 304 U.S. 1, 18; *Carter* v. *Kubler*, 320 U.S. 243, 247; *In re Oliver*, 333 U.S. 257, 273.

This Court's uncompromising insistence on including confrontation and cross-examination within the basic core of the due process concept is grounded on something more substantial than metaphysical concepts of fairness and morality. Experience derived from every court and hearing room in the land has demonstrated that confrontation and cross-examination are indispensable weapons in the arsenal of procedural devices available to uncover the truth, the only legitimate goal of any proceeding. But confrontation and cross-examination are not due process elements solely for the benefit of the accused; rather they are "the best insurance for the Government itself against those blunders which leave lasting stains on a system of

justice but which are bound to occur on ex parte consideration." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 224-225 (dissenting opinion of Mr. Justice Jackson). This Court cannot, consistent with the constitutional tradition to which it has faithfully adhered, sanction the abandonment of standards of fair procedure in security programs involving millions of Americans.

II

The Government will, as in the past, seek to avoid the force of the arguments and precedents in Point I by contending for a selective standard of procedural due process based on balancing the conflicting individual and national interests involved. We suggest, however, that the Government is totally unwarranted in this facile transposition of the "balance of interests" principle from the area of substantive rights to that of procedural due process. The procedural guarantees incorporated in the Bill of Rights concededly impose restraints, often serious restraints, upon governmental action, but this Court has not yet seen fit for that reason to sanction their disregard.

In any event, it would avail the Government naught even were this Court to attempt a balancing of individual and national interests. Even accepting, for the sake of argument only, this novel standard of procedural due process, it is manifest, on the one hand, that denial of confrontation in security proceedings renders the hearings and determinations hopelessly arbitrary and unfair and, on the other hand, that denial of confrontation is not supported by any real interest in protecting the Government's undercover operations and personnel.

A

Without confrontation security hearings are inevitably unfair and wholly arbitrary. All the reasons for cross-

examination in other areas—to test memory, opportunity for and powers of observation, degree of certainty, veracity, motivation and character—are particularly applicable in the security area. (i) Security charges almost always relate to a period long past; unable to disprove ancient accusations because time has removed affirmative witnesses, the accused is rendered largely defenseless by denial of confrontation which would permit direct disproof of the charge. (ii) Security charges deal with covert and suspect activities; since the persons most likely to be in a position to give direct rebuttal to such charges are unwilling to do so at the price of confessing their own suspect affiliation, the absence of opportunity for direct disproof through cross-examination too often leaves the security defendant unable to demonstrate his innocence. (iii) The same incriminating involvement which precludes the accused from obtaining truly knowledgeable witnesses on his own behalf also renders suspect (and especially needful of cross-examination) many of those who provide the Government with secret accusations against security defendants; persons once themselves involved with Communism are particularly subject to suggestion or even coaching at the hands of those collecting information against security defendants. (iv) Moreover, the burden of proving innocence is cast upon the security defendant and virtually no degree of indirect refutation can successfully efface the allegations of informants who remain insulated from cross-examination. (v) Finally, what renders indirect rebuttal in security cases especially meaningless is the fact that those who make the ultimate security clearance determinations are themselves denied any opportunity to examine the accusers and fairly to evaluate the credibility of their accusations. The Hearing Board is no more able to make a rational weighing of the *known* record provided by the accused and his live witnesses against the untestable accusations of *unknown* informants

than a mathematician can make a rational sum from adding apples and pears.

In short, it would not be too much to suggest that in no other area of governmental action are the accusations of faceless informants as unreliable and the opportunity of indirect rebuttal of as little value as they are in the security field.

B

In view of the manifest unfairness inherent in the denial of confrontation in security proceedings, the Government would have an overwhelming burden to demonstrate a sufficient countervailing national interest to justify the existing system. Yet, instead of providing clear and cogent reasons in support of its no-confrontation policy, the Government seeks to obscure the weakness of its position by an *in terrorem* appeal in the name of "security."

Secret informants and confrontation have been effectively utilized by the Government side by side in criminal, civil and administrative proceedings for the entire period of our history. No reason is suggested why the Government cannot use secret informants in the security field, as it does in other areas, to provide leads for obtaining witnesses to testify on the open record before the accused and his judges. The constitutional requirement of confrontation in the security field has never worked for the simple reason that it has never been tried. The Government has never sought to utilize its secret informants as suppliers of leads for witnesses to testify on the open record because it has had no incentive to do so as long as it could make its case through the accusations of the secret informants themselves. Moreover, the Government has not even troubled to arm itself with a subpoena power by which it could exercise compulsion to bring in witnesses uncovered as a result of the leads supplied by the secret informants. Until the Government

makes a serious effort to comply with constitutional requirements by providing witnesses as it does in all other proceedings affecting substantial interests, it ought not be heard to say that it cannot do so.

Thus, confrontation and the anonymity of secret informants can undoubtedly go side by side in the vast majority of security cases. But, assuming that there may be particular instances in which the secret informants are unable to supply leads by which the Government can obtain its witnesses, no reason is suggested why the unmasking of the secret informants themselves would provide obstacles never found insuperable in other areas of law enforcement.

The vast preponderance of security cases are predicated upon statements by mere casual informants covering years long past rather than the information of professional FBI agents currently secreted inside the Communist Party. Petitioner's case is no different; all his accusers are casual informants and no conceivable security consideration warrants their insulation from cross-examination. Every official and quasi-official study of the subject has led to the conclusion that as concerns mere casual informants no legitimate governmental interest requires refusal of the right to their confrontation (see pp. 42 to 46, *infra*).

Even if petitioner's accusers had been in the category of professional FBI undercover agents, which they were not, no national interest would require a different rule than in the case of casual informants. There is no reason to believe that the Government would be unable in most instances to utilize its undercover FBI agents to obtain leads to live witnesses and thus avoid the necessity for unmasking the undercover agents. But if the agent should be unable in a particular case to supply such leads, there has been no showing that the testimony of the undercover agent himself would imperil law enforcement any more than it has done in other areas. Public testimony by professional

FBI agents in other types of security proceedings and declarations from high Government officials as to the success in penetrating the Communist Party indicate that any unmasked agent would be readily replaceable without damage to our national security.

III

This Court need not resolve the ultimate constitutional issue since Congress has never authorized the unfair hearing procedures prescribed by the contested regulation. Where, as here, a serious question as to the constitutionality of a federal statute is raised, this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided. This practice has been followed many times so as to avoid needless rulings on serious and substantial questions affecting various constitutional provisions, including those incorporating the guarantee of due process. *Japanese Immigrant Case (Yamataya* v. *Fisher)*, 189 U.S. 86, 100-101; *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 351-352; *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 108. And, in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, where there was "no express requirement for any hearing or adjudication in the statute authorizing deportation," this Court nevertheless read the requirement of a fair hearing into the statute because the Court "would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency."

Application of this rule of construction makes plain the conclusion that the statutory foundation of the Industrial Personnel Security Review Program, if indeed there is any such foundation whatever, must be interpreted to give the due process type of a fair hearing, including confrontation and cross-examination, to all affected individuals.

There is nothing in any of the underlying statutes relied upon by the Government which compels or even permits the Department of Defense to deny a full and fair hearing to employees of Government contractors.

IV

Petitioner's case presents a justiciable controversy which this Court should resolve. Nothing in the observations of the Court of Appeals in the *Greene* opinion that no justiciable controversy arises out of an attack on "the Secretary's decision on its merits" has any applicability to the instant case. Nor can the claim be honored that "standing to sue" is lacking to obtain redress against the Department's unfair hearing procedure because the security clearance which is predicated upon that procedure is a mere "privilege" which the Government may withhold at will. Vital rights of private employment, opportunity for means of livelihood and the honor and self-respect of the individual, all dependent upon the outcome of a security determination, are tangible interests fully sufficient to create a justiciable controversy with respect to the validity of the procedure upon which that determination is based. See, e.g., *Harmon* v. *Brucker*, 355 U.S. 579; *Slochower* v. *Board of Higher Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183.

ARGUMENT

I

This Court Has Consistently Held Confrontation to Be a Minimum Requirement of the Procedural Due Process Imposed on All Governmental Action Affecting Substantial Interests

No principle of our jurisprudence is more firmly embedded than the procedural due process guaranteed by the Fifth and Fourteenth Amendments. This Court has con-

sistently stressed "the high social and moral values inherent in the procedural safeguard of a fair hearing" based upon "considerations which go to the very ethos of the scheme of our society . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 167, 172 (concurring opinion of Mr. Justice Frankfurter). Because fairness of procedure is the hallmark of our democratic way of life and the indispensable essence of liberty, "procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 224 (dissenting opinion of Mr. Justice Jackson).

In its elemental sense, procedural due process assures the protection of those procedures which accord with "the rudiments of fair play," *Chicago M. & St. P. R. Co.* v. *Polt*, 232 U.S. 165, 168, and which maintain "the 'inexorable safeguard' of a fair and open hearing," *Ohio Bell Tel. Co.* v. *Public Utilities Comm.*, 301 U.S. 292, 304. By insisting upon "a fair hearing upon the fundamental facts," *Southern R. Co.* v. *Virginia*, 290 U.S. 190, 199, the procedural due process principle establishes a minimum standard of fairness for governmental action affecting the life, liberty or property of those within the reach of the Constitution.

The concept of procedural due process is universal in its nature and in its application whenever substantial interests are affected. Viewed either in a constitutional or nonconstitutional[7] setting, the concept ad-

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[7] This Court has consistently construed legislation, save where explicit language precluded such interpretation, in such a manner as to impose or observe procedural due process in its basic meaning. See *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 107-108. In a later section of this brief (Point III, *infra*, pp. 50 to 56), we demonstrate that this Court need not reach the constitutional issue involved because Congress has never authorized the unfair hearing procedure prescribed by the challenged Regulation.

mits of exclusions only in the narrowest and most exceptional situations.[8] It applies equally and in undiluted form both to criminal prosecutions (*In re Oliver*, 333 U.S. 257, 273) and to civil proceedings (*Coe* v. *Armour Fertilizer Works*, 237 U.S. 413). And the concept is applicable whether the interest being asserted is denominated a "right" or a "privilege."[9] By its inherent nature, fairness of procedure is the quintessence of a fair and respected government.

Certainly, the Defense Department's Regulation barring confrontation affects substantial interests of petitioner, thus bringing into play the safeguard of procedural due process under the Fifth Amendment. If the interest in public employment is sufficiently substantial to invoke due process protections (*Wieman* v. *Updegraff*, 344 U.S. 183, 192), certainly the interest in private employment is *a fortiori* sufficient. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." *Truax* v. *Raich*, 239 U.S. 33, 41. Where, as here, petitioner's job, his means of livelihood and his reputation are all at stake, governmental action must accord with procedural due process. Whatever rare and grudging exceptions to the requirement of due process this Court may have recognized in isolated decisions in the past, none

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[8] See discussion of these exceptions in the opinion of Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 167-168.

[9] That procedural due process has never been thought applicable only to those asserting some constitutional or statutory "right" is evident from the decisions of this Court in *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 556, and *Wieman* v. *Updegraff*, 344 U.S. 183, 192, where interference with the "privilege" of public employment was held permissible only to the extent that due process was observed. See also *Speiser* v. *Randall*, 357 U.S. 513; *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156.

of the interests involved in those cases rise to the dignity and substantiality of the interest here under consideration.

The fair hearing imposed whenever substantial interests are at stake by this universal concept of procedural due process "must be a real one, not a sham or a pretense." *Palko* v. *Connecticut*, 302 U.S. 319, 327. It is not enough that a hearing be provided only to the extent deemed fair or advisable by those in charge or that some but not all of the elements of such a hearing be made available. A fair hearing by definition includes all that "is necessary for the protection of the parties" so as to "give them an opportunity to be heard respecting the justice of the judgment sought." *Hagar* v. *Reclamation District*, 111 U.S. 701, 708.

Obviously, then, something more is required than a notice of a hearing and an opportunity to present evidence on one's own behalf. Necessarily encompassed by a *fair* hearing is the opportunity to know, examine, explain and rebut all the contrary evidence. More particularly, such a hearing includes the unqualified right to be confronted with all adverse witnesses and to subject them to cross-examination. That right has been fully and consistently recognized by this Court in terms that permit no limitation. As was held nearly a half century ago in *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93:

> ". . . manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

Time and again this Court has pointed out that the opportunity to know, to be confronted with and to rebut all the adverse testimony, lies at the very heart of a fair hearing. Thus in *Morgan* v. *United States*, 304 U.S. 1, 18, the Court ruled: "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one." In *Carter* v. *Kubler*, 320 U.S. 243, 247, it is reiterated that "The basic elements of such a [fair and full] hearing include the right of each party to be apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence." Or, as put even more recently in *In re Oliver*, 333 U.S. 257, 273: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." Accord: *In re Murchison*, 349 U.S. 133, 134; *Reilly* v. *Pinkus*, 338 U.S. 269, 276; *Motes* v. *United States*, 178 U.S. 458, 474; *Ohio Bell Tel. Co.* v. *Public Utilities Comm.*, 301 U.S. 292, 300.

This Court's uncompromising insistence on including confrontation and cross-examination within the basic core of the due process concept is grounded on something more substantial than metaphysical concepts of fairness and morality. Experience derived from every court and hearing room in the land has demonstrated that confrontation and cross-examination are indispensable weapons in the arsenal of procedural devices available to uncover the truth, the only legitimate goal of any proceeding. No other or better means has ever been found to minimize the mistakes, the untruths and the distortions to which

humans are often prone. Only by face-to-face questioning of the accuser concerning his accusations can his demeanor, his memory, his opportunity for observation, his veracity, his motivation, and the basis of his charge be subjected to rational analysis and the truth revealed. Without the opportunity of cross-examining the source of an accusation, the credibility of his charge remains unprovable and the decisional process cannot then reflect selection of the true and rejection of the false, the human mind being unable to weigh the known against the unknown.

Indeed, the very thought that a man may be condemned, branded or denied some right or privilege on the basis of secret, undisclosed information is abhorrent to free men. It cannot be that what the Founding Fathers required for the most petty criminal transgression should be unavailable to one involved in a far more significant proceeding on the outcome of which depends his job, his means of livelihood and, indeed, his very name. Secrecy, it has been said, "provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (dissenting opinion of Mr. Justice Jackson). It deprives the accused person of protection against his enemies, "whose evidence may consist of nothing more than malice, vindictiveness, mistaken identity, intolerance, prejudice, or a perverted desire to destroy." [10]

But confrontation and cross-examination are not due process elements solely for the benefit of the accused. The full utilization of those elements "is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound

[10] Address of Harry P. Cain, former Senator and former member of the Subversive Activities Control Board, before the New York Civil Liberties Union, New York City, Feb. 22, 1956.

to occur on ex parte consideration." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 224-225 (dissenting opinion of Mr. Justice Jackson). In the words of Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 172, no techniques better than confrontation and cross-examination have been found "for generating the feeling, so important to a popular government, that justice has been done." And it ill serves the great interests of the Government to rely upon a system that denies to it the assurance that the true facts have been adequately exposed. The probabilities of confidential information being either baseless or false are sufficiently great to warn against reliance thereon by any government truly sensitive to the advancement of the national interest whether in security or in other public concerns.

For these various reasons—the discovery of truth, the protection of the accused from mistake or malice, and the advancement of the legitimate interests of the Government—this Court has recognized that a hearing is not fair without the opportunity for confrontation and cross-examination. That recognition constitutes a respect for the elementary rights of men in a democratic society. By insisting that our democratic Government practice fairness, this Court has made the due process principle serve as a vehicle for the quest of truth and the protection of all interests concerned. This Court cannot, consistent with the constitutional tradition to which it has faithfully adhered, sanction the abandonment of the foregoing standards of fair procedure in security programs involving millions of Americans. We respectfully submit that established principles and precedents in the area of procedural due process validate petitioner's contention that the no-confrontation Regulation is invalid and that his prayer for injunctive and declaratory relief must be granted.

II

Security Hearings Without Confrontation Are at Once Inevitably Unfair and Wholly Unjustified by Any Tangible Governmental Interest

The authorities reviewed in the preceding section are dispositive of the question before the Court. The right to confront one's accusers, a right denied by the Defense Department Regulation in issue, has been too often held an indispensable attribute of the constitutionally required fairness of governmental proceedings to permit its abandonment here. Denial of security clearance cannot be predicated upon hearings in which the accused never faces and tests the damning "evidence."

We are confident that the precedents of this Court cited in Point I leave no doubt that a proceeding in which petitioner's job, livelihood and reputation are all at stake must accord the minimal due process requirement of confrontation; nor do we believe that the Constitution leaves room for a dilution of this principle in the name of some national interest, real or fancied. But we are, of course, aware of the more selective standard of procedural due process which was presented to this Court by the Solicitor General in *Bailey* v. *Richardson*, 341 U.S. 918: "The harm to the individual must be weighed against the harm to the public. The problem is one of 'balancing the conflicting individual and national interests involved'..." (Brief, p. 76). The same position was adopted in the Government's brief (p. 61) in *Peters* v. *Hobby*, 349 U.S. 331, and no doubt the Solicitor General will again urge this diluted standard of due process upon the Court. We suggest, however, that the Government is totally unwarranted in this facile transposition of the "balance of interests" principle from the area of substantive rights (see, e.g., *American Communications Ass'n.* v.

Douds, 339 U.S. 382, 410; *Watkins* v. *United States*, 354 U.S. 178, 198; *NAACP* v. *Alabama*, 357 U.S. 449), to that of procedural due process. The procedural guarantees incorporated in the Bill of Rights concededly impose restraints, often serious restraints, upon governmental action; but this Court has not yet seen fit for that reason to sanction their disregard. We cannot believe this Court will now sanction the variable standard of procedural due process proposed by the Government. Where, as here, substantial interests are affected, the requirements of procedural due process, including confrontation, are not subject to disregard because of some real or fanciful governmental need. The Government's suggestion that it is only bound by procedural requirements when they do not inhibit vital governmental action would open the gates to abandonment of due process safeguards in the very areas of tension where they are most needed.[11]

In any event, it would avail the Government naught even were this Court to attempt a balancing of individual and national interests. Even accepting, for the sake of argument only, this selective application of procedural due process, it is manifest, on the one hand, that denial of confrontation in security proceedings renders the hearings and determinations hopelessly arbitrary and unfair and, on the other hand, that denial of confrontation is not supported by any real interest in protecting the Government's undercover operations and personnel. We turn now to demonstrate that, on a weighing of the individual and governmental interests involved, all criteria inexorably militate towards adherence to the constitutional tradition of fair hearing.

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[11] If the Government's present contention—that the right of procedural due process gives way before other national interests—should be accepted, the door will be open to the dilution of every procedural guarantee in the Bill of Rights. What more reason, one may ask, is there for disregarding procedural due process, including confrontation, under the Fifth Amendment, than there is to dilute the right to confrontation under the Sixth Amendment?

A. *Without Confrontation Security Hearings and Determinations Are Inevitably Unfair and Wholly Arbitrary*

Very real and practical considerations have caused this Court to hold confrontation an indispensable attribute of a fair hearing. Only by interrogation of the accuser can his memory, his opportunity for and powers of observation, his degree of certainty, his veracity, his motivation, and his character be subjected to analysis. Without cross-examination, mistake, confusion, misrecollection, conjecture, opinion, irresponsible hearsay, coaching, or even malice, will necessarily go undetected. All these considerations are particularly applicable in the area of security clearance. By their very nature, security clearance determinations without opportunity for cross-examination of the accusers are necessarily unfair and arbitrary.

(i) *Lapse of time.* Security charges almost always relate to a period of time long past. Petitioner's own burden of disproving in 1956 a charge relating to the years 1942-1943 is by no means unusual.[12] In the absence of a "statute of limitations", indirect rebuttal of security accusations is rendered especially difficult simply by the passage of time and the consequent obliteration of pertinent evidence and available witnesses. The security defendant finds it most difficult to locate contemporaneous witnesses, and if located, to evoke their recollection as to years long past; he finds additional obstruction in the reluctance of otherwise sympathetic persons to risk "taint" by assistance to a "sus-

[12] Since the security programs are aimed primarily at weeding out persons "sympathetic" to Communism and since the bulk of the persons in the United States who have ever had anything to do with Communism, the Communist Party, or Communist-front organizations did so at a time long past when such associations were not yet generally deemed wrongful, it is in the very nature of the security program that it deals largely with ancient associations. See, e.g., Brown, *Loyalty and Security* (1958), p. 491, table 6.

pect." Unable to disprove ancient accusations by his own affirmative witnesses, the accused is rendered largely defenseless by denial of confrontation which would permit direct disproof of the charge.[13]

(ii) *Nature of charges.* Security charges deal with covert and suspect activities. Far from being matters of public record or public knowledge upon which collaterally disprobative evidence might readily be produced, the usual charge is that of membership or affiliation with some subversive or suspect organization or individual [14]—precisely the kind of charge on which it is most difficult to obtain willing witnesses to the security defendant's innocence. Thus petitioner had no hope of producing the 1942-43 Communist Party members in the Buffalo area who could have testified that he was not a member or an affiliate of the Party during those years.[15] Not only would such persons likely invoke

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[13] The fact that security charges almost always relate to a period of time long past adds an additional danger in the absence of confrontation—the danger of a mistake in identity. Actually, in petitioner's case, it was not only his own view but that of one of the witnesses on his behalf that he had been confused with Alvin Taylor, a notorious associate of Allie Brodose, to whom the basic charge against petitioner obviously did apply (R. 54, 238, 249). *Cf.* Bontecou, *The Federal Loyalty-Security Program* (1953), p. 83.

[14] "The great majority of cases calling for investigation have come under the provisions concerning membership in, affiliation with, or sympathetic association with the various groups identified with the Communist Party and designated by the Attorney General as subversive organizations." Richardson, *The Federal Employee Loyalty Program*, 51 Col. L. Rev. 546, 547. While Mr. Richardson was here referring to the Government's program for its own employees rather than the Government's program for industrial employees, all considerations relating to the nature of charges, types of secret informants, investigative reports and need for confrontation, are substantially identical for the two programs.

[15] Actually, petitioner's counsel did make valiant efforts to produce knowledgeable, Buffalo-area Communists from the relevant period, but his efforts proved wholly futile. Petitioner's counsel told the Board that one key witness "wouldn't so much as speak to me," that another was "deported," and that efforts to communicate with two others amounted only to a waste of time (R. 414-415).

their constitutional privilege against incrimination if called, but there is not even available a subpoena power by which petitioner might have brought them to his "hearing." Since the persons most likely to be in a position to give direct rebuttal to the charges are unwilling to do so at the price of confessing their own suspect affiliation, the absence of opportunity for direct disproof through cross-examination too often leaves the security defendant unable to demonstrate his innocence.

(iii) *Danger of false accusation.* The same incriminating involvement which precludes the accused from obtaining truly knowledgeable witnesses on his own behalf also renders suspect (and especially needful of cross-examination) many of those who provide the Government with the secret accusations against security defendants. "The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others." *Regina* v. *Farler*, 8 Car. & P. 106, 108 (Lord Abinger, 1837). Thus the accusations against petitioner apparently emanate (through how many hearsay steps nobody knows) from persons who were themselves in some way involved with Communism. Such persons are particularly subject to suggestion or even coaching at the hands of those collecting information against security defendants.[16] Thus petitioner's own case indicates a very real

[16] For examples of "security informants" who have subsequently confessed their own falsehoods or whose falsehoods have been publicly confessed by the Government, this Court need not go beyond its own records. There is no knowing how many times Harvey Matusow, Paul Crouch, Manning Johnson and Joseph Mazzei were used as secret informants in security cases before the concession of their untruthfulness was made in this Court. See *Mesarosh* v. *United States*, 352 U.S. 1; *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115.

Other evidence is readily available. A report of the Joint Congressional Committee on Atomic Energy cites a case in which exceptionally damaging charges withered completely under oath and examination. The Committee said that this:

likelihood of such suggestion or coaching. In the 1956 Statement of Reasons petitioner was charged with Communist Party membership during 1942-43 and the secret informants' statements before the Board at that time indicated that he "may still have membership in the Communist Party" (R. 38). At the 1956 "hearing," a principal affirmative defense for petitioner was that in 1942-43 he had opposed the Communist Party policies of Allie Brodose on incentive pay and the no-strike pledge. In 1958, the secret informants suddenly recalled petitioner's 1943 "expulsion" from the Party on the very grounds he had given as his defense (R. 102-104), an expulsion which had never even been suggested by any accuser up to that time. Instead of affording petitioner an opportunity to impeach his accusers by cross-examination, the Government's role appears to have been one of leading the secret informants in an effort to rationalize the irreconcilable conflict at the 1956 "hearing." Nothing could show more clearly the need for confrontation to prevent false, self-serving or induced accusations from wrongfully placing guilt upon defenseless citizens.

". . . serves as a warning that an informant may perhaps give the FBI highly unfavorable advice but, when placed under oath before a local board, deny all that he had said, admit that he knows little or nothing about the employee, and admit further that he bore him a grudge." S. Rep. No. 1169, 81st Cong., 1st Sess., 59, 68.

There is nothing uncommon in such incidents. This Court is familiar with the case of Harvey Matusow who says he lied 245 times when he testified against alleged Communists. The records are replete with other examples. See Bontecou, *Due Process in Security Dismissals*, 300 The Annals 102; Yarmolinsky, *Case Studies in Personnel Security* (1955); *Brief for American Civil Liberties as Amicus Curiae, Greene* v. *United States*, No. 180. In the words of Mr. Justice Jackson when he was still Attorney General, "Investigative reports include leads and suspicions, and sometimes even the statements of *malicious* or misinformed *people*" (quoted in Barth, *How Good Is an FBI Report*, Harpers, March, 1954, in which the author fully documents the case for an adverse answer to the question he poses.)

(iv) *Burden of proof.* Moreover, in the absence of confrontation and the opportunity for direct disproof of the Government's charges, virtually no amount of indirect rebuttal will meet the security defendant's overwhelming burden of proving his innocence. Unlike ordinary criminal and administrative proceedings, in security hearings the burden is not on the Government but on the accused. Under the applicable Regulation it is not the withholding of a clearance which must be determined to be in the national interest, but rather the *granting* of clearance which must be found *"clearly consistent with the interests of the national security"* (Industrial Personnel Security Review Regulation, par. 12, 20e). Every security defendant finds it necessary not merely to cast reasonable doubt upon the faceless accusations against him, but he must show them to be so utterly groundless that no slightest doubt remains in the minds of his judges—a well-nigh insuperable burden of proof while there is no opportunity to cross-examine the accusers.

Thus, although ten fellow employees at Bell in 1942-43 testified under oath to corroborate the fact that in these very years petitioner was a prominent anti-Communist in his local union—in open opposition both to the Communist Party leadership and the Party's program—the Hearing Board twice found in favor of petitioner's unknown accusers. So grave are security charges, and so onerous the burden of defense, that virtually no degree of indirect refutation can successfully efface the allegations of informants who remain insulated from cross-examination.

(v) *Informants hidden from Hearing Boards.* Finally, what renders indirect rebuttal in security cases especially meaningless is the fact that those who make the ultimate security clearance determinations *are themselves denied any opportunity to examine the accusers and fairly to evaluate the credibility of their accusations.* The lack of

Hearing Board access to the accusers, fully illustrated in petitioner's case (see n. 5, pp. 9-10, *supra*), is not the exception but the rule. The Director of the FBI and of the Industrial Personnel Security Program have testified that the identities (name, occupation, activities, and other identifying information) of confidential informants remain in the files of the FBI, preventing those who must make security determinations from examining the informants and evaluating their trustworthiness, motivation and reliability. Testifying before a Subcommittee of the Senate Committee on Foreign Relations ("State Department Employee Loyalty Investigation" hearings, 81st Cong., 2d Sess.), FBI Director J. Edgar Hoover gave the following explanation of the relationship between FBI reports and the federal agencies (at pp. 327-28):

> "After the investigation is completed, when indicated by Department procedure or judgment, a summary of the facts developed is furnished to the Department of Justice or United States attorneys. In other types of investigations, the reports of special agents are submitted to the interested agency of the Government. Details and information dealing with administrative operations and confidential sources of information remain in our files."

And Director Hoover reiterated that:

> "The report as you see it in the Bureau, the working file or the raw file, will contain the identity of all informants, the source of the information, and the method by which it was received. The report is then digested, and transmitted to the Civil Service Commission with administrative details and confidential sources remaining in our files. . .
>
> Senator HICKENLOOPER. . . As you stated a moment

ago, I believe that you either symbolize or give reference by number to the source of information on the part of those people who do not like to have their names disclosed.

Mr. HOOVER. That is correct, and when we submit that report to the Civil Service Commission in the loyalty cases it is a summary of the investigation by the Bureau. . . no confidential reports of the Bureau have ever been made available to anybody" (pp. 330-31).[17]

Industrial Personnel Security Director Jerome D. Fenton, testifying in 1955 hearings on "Security and Constitutional Rights" before a Subcommittee of the Senate Judiciary Committee (84th Cong., 2d Sess.), likewise conceded that those who make the security clearance determinations are denied opportunity to examine accusers (at p. 624):

"Mr. HOCKER. Can you tell me what type of help is given to the hearing board in these reports with respect to the matter of evaluation? What is the nature of the evaluation that is used for this purpose?

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[17] It is hard to conjure up any possible justification for requiring the Board to act upon summaries of FBI investigations instead of the original reports. The governing Regulation (par. 11) requires that every member of the Board must have a Top Secret security clearance, the highest clearance available. No doubt the provision of mere summaries to the "security-cleared" members of the Board serves to remove inconsistencies and confusion that would otherwise appear from the reports, but it hardly assists the Boards in evaluating the reliability of the informants' accusations.

Just as there is no possible justification for denying the security-cleared Boards the original FBI reports, so there is no justification for refusing the Boards an opportunity to examine the informants themselves. It is difficult to understand why other governmental departments have not provided this minimal safeguard adopted by the Atomic Energy Commission which permits Hearing Board interrogation of accusers. Atomic Energy Commission Regulation Sec. 4.27(m), 21 Fed. Reg. 3103, 3107, (May 9, 1956), states when open confrontation of a witness is not advisable the Hearing Board may require the witness "to testify privately and be subject to thorough questioning by the Board and its Counsel."

Mr. FENTON. Well, each board has a person who is called a security adviser, who is an expert in that particular area. Each screening board has one, and those individuals are well-trained people who know how to evaluate reports and evaluate information. They know how to separate the wheat from the chaff, and they assist these boards.

Mr. HOCKER. *This expert, then, has to take the report and make his own determination in assisting the board as to the reliability of a witness that he has never seen, or perhaps hasn't even had the opportunity to see the person who interviewed the witness?*

Mr. FENTON. *Well, he has nothing to do with the witness; no.*

Mr. HOCKER. *What is that?*

Mr. FENTON. *He has not interviewed the witness; no*" (emphasis supplied).[18]

In short, the Hearing Board regularly has before it no more than summarized versions of statements by accusers whose very identities remain unknown to the Board. Forced to "weigh" the testimony of the defendant and his witnesses against mere summarized versions of statements by unknown informants, the Hearing Board is in no position to make "findings of fact." The Board can no more make a rational weighing of the ***known*** record provided by the accused and his live witnesses against the untestable accusations of ***unknown*** informants than a mathematician can make a rational sum from adding apples and pears. Precisely because the Board can have no basis for weighing the known against the unknown, there is a very real risk that the

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[18] In like vein Seth W. Richardson, former Chairman of the Loyalty Review Board and Subversive Activities Control Board, also emphasized the unavailability to the boards themselves of the informants and even their identities since the FBI "will not disclose to anyone" informants, "whose names are known only to the FBI." Richardson, *The Federal Employee Loyalty Program*, 51 Col. L. Rev. 546, 549, 550.

Board will accept the unknown simply because it comes from a governmental source.[19]

Thus, as against petitioner's twelve live and known witnesses, the Board had to "weigh" the accusations of persons whose identity, credibility and basis of information were unknown to the Board. In fact, the record demonstrates that in most instances the charges were based upon no more than second-, third-, and fourth-degree hearsay on the part of the accusers themselves (see n. 5, *supra*).[20] The repeated "finding" that petitioner had been a Communist Party member was not a finding of that fact, but only of the admitted fact that persons unknown to the Hearing Board reported that other persons accused petitioner of such membership—whether upon the basis of mistake, confusion, misrecollection, conjecture, opinion, hearsay, malice or any other ground, all remaining unknown to the Board. Petitioner's proof could not rationally be weighed against

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[19] The danger that the Board will accept the unknown simply because it appears in a governmental document is quite real. See, e.g., Yarmolinsky, *Case Studies in Personnel Security*, p. 7 (1955). Indeed, in petitioner's case, the Chairman of the Board, referring to petitioner's alleged Communist Party membership and transfer cards, which the Board admittedly did not have before it (R. 130), stated at the very outset of the hearing: "At this time it is our intention, and the statement of reasons would indicate, to consider that these documents exist" (R. 131).

[20] What makes likely the acceptance not only of all degrees of hearsay but also of totally groundless accusations by dubious informants is the fact that the Board may unknowingly accept the statement of a totally unreliable individual. Thus, as FBI Director Hoover has testified, no matter how improbable or flimsy, an accusation made to an FBI agent must be included in his report and in turn passed on *without evaluation* to the Hearing Board. Testimony of J. Edgar Hoover, *Department of State, Justice, Commerce and the Judiciary Appropriations for 1951*, Senate, 81st Cong., 2d Sess. (1950), p. 130; see also S. Rep. 1169, 81st Cong., 1st Sess., p. 68. While the Board thus receives every baseless charge, the deletion of information concerning the informant which takes place during the process of summarization may deny it the information necessary to reveal that very baselessness. Director Fenton appropriately warned of the difficulty "in evaluating information whose source must be veiled so carefully." First Annual Report of the Industrial Personnel Security Review Program, p. 8.

the accusations of the Government's unknown informants to produce anything except haphazard conjecture.

In sum, the considerations which render confrontation indispensable to a fair hearing in other areas are doubly applicable to the security programs. In no other area are the accusations of faceless informants as unreliable and the opportunity of indirect rebuttal of as little value. The inevitable injustices which have resulted over the past decade from the denial of confrontation in these security programs provide living proof that unfair processes produce arbitrary results. See, also, cases cited in *Brief for the American Civil Liberties Union as Americus Curiae* in *Greene* v. *United States*, No. 180. But what makes these injustices all the more intolerable is the absence of any genuine Governmental justification for the denial of the traditional procedural safeguards.

B. *No Governmental Interest Is Served by Denial of Confrontation in Security Proceedings*

In view of this demonstration of the manifest unfairness inherent in denial of confrontation in security proceedings, the Government would have an overwhelming burden to demonstrate a sufficient countervailing national interest to justify the existing system. Yet, instead of providing clear and cogent reasons in support of its no-confrontation policy, the Government seeks to obscure the weakness of its position by an *in terrorem* appeal in the name of "security." We cannot believe that this Court will accept the Government's security *ipse dixit* here any more than it would accept unsupported governmental claims in any other field where the Bill of Rights is involved.[21]

The claim that the "security" of Government undercover

[21] The Government will likely formulate its justification of the no-confrontation policy in terms of the necessity for safeguarding classified defense information or military secrets. But such a formulation obscures rather than clarifies, for the constitutionally-required disclosure is not of

operations would be imperilled by observance of due process confrontation requirements, is groundless. Secret informants and confrontation have been effectively utilized by the Government side by side in criminal, civil and administrative proceedings for the entire period of our history; secret informants and confrontation can be effectively utilized side by side in today's security programs. No reason is suggested why the Government cannot use secret informants in the security field, as it does in other areas, to provide leads for obtaining witnesses to testify on the open record before the accused and his judges. Even in criminal cases, where the fewest possible individuals are parties or witnesses to the crime, the Government has been able to produce the necessary witnesses in open court. All the more readily could its secret informants in the security field provide leads to the numerous persons who necessarily observed the challenged associations and activities on which security charges are regularly predicated.

Thus, in petitioner's case, if it were in fact true that he attended meetings of the Communist Party in Buffalo in the years 1942-1943, when the Party there was large enough to help elect its own man President of the Bell local union, it is incredible that the Government's secret informants could not have provided leads to a single person anywhere in the United States who would deem it his duty to come before the Hearing Board and tell of petitioner's prior activities. Precisely because the Government was able to use its secret informants against petitioner with-

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defense secrets but simply of the identities of informants upon which the Board proposes to rely in reaching its conclusion. Petitioner does not contend that due process requires the disclosure of defense secrets to him; he does contend that he may not be denied access to such classified information and thereby deprived of his job, livelihood and good name, without the disclosure to him of the names of the informants and the opportunity to examine them. If any balancing of interests in this area is justified, which we deny (see pp. 27 to 28, *supra*), the balance is not between defense secrets and confrontation but between the anonymity of informants and confrontation.

out their confrontation, it had no incentive to utilize its informants in their historic role as providers of leads for witnesses who would testify openly. What we have in the security programs today is a system based on *administrative convenience* rather than *security necessity*.

The constitutional requirement of confrontation in the security field has never worked, for the simple reason that it has never been tried. When confrontation was seriously considered in 1947 at the inception of the loyalty-security programs, it was quite clear that those charged with the responsibility for their operation accepted the need for confrontation; it was only the strong objection of the Federal Bureau of Investigation that any confrontation would "hinder" and "impede" its investigative work that caused the reluctant institution of the no-confrontation system. See statement of Seth W. Richardson, Chairman, Loyalty Review Board, December 27, 1947, Appendix B, p. 64, *infra*. The Government has never sought to utilize its secret informants as suppliers of leads for witnesses to testify on the open record. It has never done so, we have already shown, because it has had no incentive to do so as long as it could make its case through the accusations of the secret informants themselves. Moreover, the Government has not even troubled to arm itself with a subpoena power by which it could exercise compulsion to bring in witnesses uncovered as a result of the leads supplied by the secret informants. Until the Government makes a serious effort to comply with constitutional requirements by providing witnesses, as it does in all other proceedings affecting substantial interests, it ought not be heard to say that it cannot do so.

What has been said concerning the utilization of informants to obtain leads for witnesses, particularly if the Government at long last arms itself with the subpoena power, leaves no doubt that confrontation and the anonymity of

informants could go side by side in the vast majority of security cases without imperilling any national interest. But, assuming that there may be particular instances in which the secret informants are unable to supply leads by which the Government can obtain its witnesses, no reason is suggested why the unmasking of the secret informants themselves would provide obstacles never found insuperable in other areas of law enforcement. While up to this point the considerations involving the proper utilization of informants have applied equally to all types of informants, the question of unmasking requires a differentiation between the so-called casual informants, on the one hand, and professional FBI agents continuing in undercover activities on the other. While we do not believe that occasional disclosure of identity in either category would adversely affect national security, we review the cases separately for the convenience of the Court.

1. *Unmasking of Casual Informants*

The vast preponderance of security cases are predicated upon statements by mere casual informants covering years long past rather than the information of professional FBI agents currently secreted inside the Communist Party.[22]

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[22] Seth W. Richardson, former Chairman of the Loyalty Review Board and the Subversive Activities Control Board, emphasized that merely casual informants are involved in the "overwhelming majority of cases":

". . . confidential informants are members of the public who will give information to the FBI only under a strict seal of confidence, their reasons being the obvious ones of the ordinary citizen who refuses to get involved in a public controversy. A further source might be fellow employees or business associates who, unless given complete anonymity, would not under any circumstances disclose their knowledge to the FBI. Numerous comparable informants might be referred to, and in *the overwhelming majority of cases*, the material facts with reference to derogatory items come from such confidential sources." Richardson, *The Federal Employee Loyalty Program*, 51 Col. L. Rev. 546, 550 (emphasis supplied).

Petitioner's case is no different, for all of his accusers are casual informants (see *supra*, n. 5, pp. 9-10). As to these persons, no conceivable security consideration warrants their insulation from cross-examination; yet the Defense Department Regulation against confrontation makes no distinction between such casual informants, the disclosure of whose identity in no sense impairs undercover activities, and those professional agents continuing to serve in an undercover capacity. The issue before the Court is only as to casual informants, shielded from confrontation by the indiscriminate provisions of the Regulation at issue.

There is substantial agreement among responsible experts that the indiscriminate no-confrontation policy of the security programs is unjustified by any legitimate secrecy considerations. *Every responsible study of the subject has led to the conclusion that as concerns mere casual informants no legitimate governmental interest requires refusal of the right to their confrontation.*

That is the conclusion of the bipartisan "Commission on Government Security" established by Act of Congress (Public Law 304, 84th Congress; 69 Stat. 595) to study the Government's security programs with a view, among other considerations, to the establishment of an industrial security program "which will protect the national security and preserve basic American rights." This Commission—under the chairmanship of Mr. Lloyd Wright and whose members included Senators Cotton and Stennis, and Representatives William M. McCulloch and Francis H. Walter—was unanimous in its 1957 recommendation on the subject of confrontation in the security programs. The Commission pointed out (at p. xviii) that those whose livelihood and reputation may be affected by security investigations are "entitled to fair hearings and to decisions which are neither capricious nor arbitrary." While recommending against confrontation which would expose the Government's

"counterintelligence operations and personnel," it was the explicit recommendation of the Commission that

> *"where loyalty charges are involved, no derogatory information, except that supplied by a regularly established confidential informant engaged in intelligence work for the Government whose identity may not be disclosed without compromising the national security shall be considered over the objection of the individual involved unless such individual is given the opportunity to cross-examine under oath the person supplying such derogatory information."* [23]

A similar judgment comes from the late General William J. Donovan, wartime head of the Office of Strategic Services, who states in his study (Donovan and Jones, *Program for a Democratic Counter Attack To Communist Penetration of Government Service*, 58 Yale L.J. 1211, 1235):

> "Certainly in practice much more could be disclosed to the employees than is currently disclosed. There seems no reason why the anonymous informant who is not in the regular employ of the FBI and whose testimony is relied on by the Board should not be revealed to the employee. It seems reasonable also that the Board should have the right to subpoena these informants. If non-confidential informants do not want to stand up and be counted, then their information should be used only as possible leads and not be made the basis of a record which cannot be refuted."

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[23] And see Report at pp. 669-71. Even as concerns the undercover agent as distinguished from the casual informant the Commission recommends confrontation "where the head of the investigative agency is of the opinion that his identity may be disclosed" (at p. 669). *Cf.* Coast Guard Regulations with respect to port security amended on April 27, 1956, after the decision in *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9, 1955) to require that "every effort shall be made to produce material witnesses . . . in order that such witnesses may be confronted and cross-examined by the applicant or holder." 33 CFR, § 125.43(f).

In like vein, former Solicitor General Philip B. Perlman, who in 1951 had argued against confrontation before this Court in the *Bailey* case, testified before a Senate Committee four years later that "mistakes were made in the administration of the loyalty program, and the way opened for abuses, the extent of which are now becoming apparent" and then pointed out that:

> "The right of confrontation of accusers, and the right of cross-examination, have been so generally breached under the security programs that there is a serious question as to whether the resulting injustice to suspected persons and the weakening of safeguards upon which all free citizens are accustomed to rely are necessary to promote the national security.
>
> The accused employees and even hearing boards are not informed as to whether it is actually necessary to withhold the identity of accusers for actual security reasons, or whether, as must be the situation in some cases, the informers prefer to remain secret in order better to perpetrate an injustice.
>
> The Government, I assume, would not deliberately protect such people, but its officials do not seem to have any choice." [24]

Similarly, after voluminous hearings on the "Administration of the Federal Employees' Security Program" (84th Cong., 2d Sess., S. Rep. 2750), the Johnston Committee, a Subcommittee of the Senate Committee on Post Office and Civil Service, recommended in its report that Congress enact new legislation replacing all existing loyalty-security programs, which would specify "*the instances when, and only when, unidentified informers and witnesses may be used*

[24] Hearings Before a Subcommittee of the Committee on Post Office and Civil Service, 84th Cong., 1st Sess., on "Administration of the Federal Employees' Security Program," p. 110.

in hearings against Federal employees" and embodying a requirement "*that confrontation must be made except as the Congress shall delineate*" (p. 547).

A recent study echoing the conclusions of these official sources is that of the Committee of the Association of the Bar of the City of New York on *The Federal Loyalty-Security Program* (1956). The Committee recommends that (pp. 174-5):

> "4. The identity of an informant who regularly provides or is employed to provide secret information should not be disclosed by requiring his appearance before a screening board or a hearing board or otherwise identifying him, whenever the head of the department or agency which obtained such information shall certify that the identification or presence of such an informant would be detrimental to the interests of national security. To the extent practicable and consistent with the interests of national security, certificates should be accompanied by data which would aid the board in evaluating the evidence given by the informant, including a statement of whether he obtained the information at first hand or through hearsay.
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> 5. As to all other witnesses, including casual informants, and with due consideration of the national security and fairness to the employee
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> (a) the screening board should determine whether it desires a witness to appear before it for interview, and
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> (b) the hearing board should determine whether the witness should be produced for cross-examination, or whether because of special circumstances he should be interrogated by the board without the employee being present, or whether his evidence should be given to the board in other ways, such

as by an affidavit or a signed statement. So far as consistent with the requirements of national security, a hearing board should make available to the employee the substance of all evidence it takes into consideration which was given by any witness whom the employee has not been permitted to cross-examine."

The Committee emphasized that (p. 178):

"The certificate procedure should not be used to excuse informants, even though regular agents, if their identity has been widely disclosed in other proceedings; the certificate procedure should be limited *to agents who are undercover and will continue to remain undercover*" (emphasis supplied).

The unanimity of these official and quasi-official statements, emanating as they do from persons who could by no means be deemed unsympathetic to the Government's security needs, is impressive demonstration both of the grave injustices which have resulted from the lack of confrontation and the absence of "security" justification for its indiscriminate denial. Nor could any reasonable observer conclude otherwise. To suggest that casual informants will not give their information to the Government unless their anonymity is guaranteed is at once to impugn both their patriotism and their veracity. We respectfully submit that the fabric of democracy, which is the ultimate security of our nation, will be better served by an end of talebearing by those unwilling to stand up and be counted. In the words of the Court of Appeals for the Ninth Circuit, "it may well be that in the long run nothing but beneficial results will come from a lessening of such talebearing." *Parker* v. *Lester*, 227 F. 2d 708, 720 (C.A. 9, 1955).

2. *Unmasking of Professional Undercover Agents*

Petitioner could well rest with the discussion and authorities in the preceding section, for, as already indicated, petitioner's faceless accusers are merely casual informants, not professional FBI agents operating inside the Communist Party. But we respectfully submit that, even if petitioner's accusers had been persons in the latter category, no national interest would require a different rule than in the case of the casual informants.

While the official and quasi-official observers of the security programs have not unexpectedly been reluctant to go beyond casual informants in their urging of confrontation (see pp. 42 to 46, *supra*), those observers of the security programs who have taken full account of the grave injustices resulting from the absence of confrontation and who have considered constitutional as well as security implications have regularly supported a return to the traditional requirements of fair hearing without regard to the nature of the informant. The responsible private authorities who have emphasized the absolute indispensability of confrontation to fair hearing in security cases without distinction as to the nature of the informant include Professor Ralph Brown (*Loyalty and Security*, 1958, pp. 394-97); Miss Eleanor Bontecou (*The Federal Loyalty-Security Program*, 1953, pp. 246-48); former Attorney General Francis Biddle (*The Fear of Freedom*, p. 215); the late Professor Zechariah Chafee, Jr. (*35 Years With Freedom of Speech*, pp. 26-27); Professor Walter Gellhorn (*Security, Loyalty and Science*, pp. 207-8); The American Jewish Congress (*Report of the Commission on Government Security*, 1957, p. 662); former Senator and member of Subversive Activities Control Board Harry P. Cain (*Address Before New York Civil Liberties Union*, New York City, February 22, 1956); and Professor Paul Klemperer

(*Hearings, n. 24, supra*, p. 373).[25] We respectfully submit that the cited commentators and students have reached the only possible conclusion permitted by the Constitution or required by national security.

As we have already seen, there is no reason to believe that the Government would be unable in most instances to utilize its undercover FBI agents to obtain leads to live witnesses and thus avoid the necessity for unmasking the undercover agents. But if the undercover agent should be unable in a particular case to supply such leads, there has been no showing that the testimony of the undercover agent himself would imperil law enforcement any more than it has done in other areas. Thus public testimony by professional FBI undercover agents has readily been given in criminal cases under the Smith Act (see e.g., *Dennis* v. *United States*, 341 U.S. 494) and in administrative proceedings involving the Communist Party (see *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115). Apparently such unmasking of the undercover agents has not embarrassed the Government, for it freely boasts that the FBI has "penetrated the inner circle of the Communist Party with undercover informants. The success of the FBI in this regard has been so outstanding that the Communist Party in this country doesn't know which of its Communist members to trust" (Attorney General Brownell, April 9, 1954). It would not appear an unfair conclusion from declarations

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[25] Thus, Mr. John Lord O'Brian, in his 1955 Harvard Godkin Lectures, "National Security and Individual Freedom," states that "the excuse put forward . . . that disclosure of the identity of secret witnesses would hamper the prosecution in obtaining evidence" is "always the justification of the police" (p. 37). Reviewing precedents that reach back 2,000 years to Festus and King Agrippa and to the younger Pliny and Emperor Trajan, Mr. O'Brian concluded: "These historic statements throw into sharp relief some of the practices to which our government officials have recently been resorting. At the same time they may help to restore something of our own traditional perspective and sanity of outlook" (pp. 61-63).

on high such as these that an undercover agent inside the Communist Party would be readily replaceable without damage to our national security. No more than in the case of the casual informant will the occasional unmasking of an FBI undercover agent disarm this nation's defenses.[26]

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Grave as is the external and internal threat to this nation, we have not yet so far abandoned our 170-year constitutional tradition of governmental fairness as to permit the wholesale substitution of secret character assassination for the fair hearing heretofore required in governmental proceedings. Under this Court's binding precedents (see Point I) and even on a "balance" of the individual and governmental interests here involved (Point II), the Regulation denying confrontation clearly violates the due process guarantee of the Fifth Amendment.

But the constitutional issue need not be reached by this Court. For, as we show below (Point III), Congress has never authorized a departure from fundamental constitutional requirements in the Industrial Personnel Secu-

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[26] At times defenders of the no-confrontation hearing system have conjured up the hypothetical case of an FBI undercover informant high in the councils of the Communist Party obtaining information that a Communist espionage agent is presently employed with access to vital secrets; the Government, they say, ought not be forced to choose between the unmasking of its informant and the retention of the espionage agent in so sensitive a position. No such case, of course, has ever been brought to the light of day. See n. 32, p. 60, *infra*. We respectfully suggest, however, that if such a factual situation were ever to arise, standard counterespionage methods and ultimate criminal trial would inevitably preclude the operation of security programs. *It is patently absurd to suggest that after learning the identity of a spy, the Government would operate in the amateurish and clumsy fashion of moving to revoke his clearance.* At any rate, we have yet to hear any plausible reason why, if such a bizarre case ever were to arise, the Hearing Board, cleared for Top Secret, should be deprived of the opportunity to cross-examine the informant *in camera*.

rity Program; the no-confrontation Regulation presently in issue falls for lack of the necessary statutory foundation.

III

This Court Need Not Resolve the Ultimate Constitutional Issue Since Congress Has Never Authorized the Unfair Hearing Procedure Prescribed by the Contested Regulation

A fundamental tenet of this Court's role in the process of constitutional development is that grave constitutional issues are to be decided only when they inescapably present themselves for adjudication. A necessary corollary of that principle is that, where a serious question as to the constitutionality of a federal statute is raised, the Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided. If the express language of Congress does not compel the opposite result, this Court will select the interpretation that is consistent with the relevant provision of the Constitution and that accordingly avoids constitutional adjudication. See, e.g., *United States* v. *Rumely*, 345 U.S. 41.

This practice has been followed many times so as to avoid needless rulings on serious and substantial questions affecting various constitutional provisions, including those incorporating the guarantee of due process. Thus in the *Japanese Immigrant Case* (*Yamataya* v. *Fisher*), 189 U.S. 86, 100-101, this Court said:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as under-

stood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends. . . .

"This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant."

And in *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 351-352, it was reiterated that:

"We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law.' "

This same concept has been spelled out more recently in *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 108:

"Wherever possible, statutes must be interpreted in accordance with constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired that §11(b)(2) be lawfully executed by giving appropriate notice and opportunity

for hearing to all those constitutionally entitled thereto. . . ."

See also: *American Communications Assn.* v. *Douds*, 339 U.S. 382, 407; *Ex parte Endo*, 323 U.S. 283, 299; *Cox* v. *New Hampshire*, 312 U.S. 569, 575; *Knights Templars' and M. Life Indem. Co.* v. *Jarman*, 187 U.S. 197, 205.

The fact that a particular statute does not in terms require a hearing as to an accused does not make irrelevant the foregoing canon of construction. To the extent that the Constitution may be said to require such a hearing, the statute will be read as imposing that constitutional requirement so long as the statutory language does not expressly forbid such a reading. An example of this interpretative process is to be found in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, where there was "no express requirement for any hearing or adjudication in the statute authorizing deportation." The Court nevertheless held (pp. 49-50) that:

> ". . . the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing, is that without such hearing there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body. . . . We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.
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> "Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one,

one before a tribunal which meets at least currently prevailing standards of impartiality. . . ."

Application of this rule of construction makes plain the conclusion that the statutory foundation of the Industrial Personnel Security Review Program must be interpreted to give the due process type of a fair hearing, including confrontation and cross-examination, to all affected individuals. There is nothing in any of the underlying statutes relied upon by the Government which compels or even permits the Department of Defense to deny a full and fair hearing to employees of Government contractors.[27]

Thus the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. § 151 (41 U.S.C. (1952 ed.) 151(c) (12), 153(a), later recodified with minor changes as 10 U.S.C. (Supp. V) 2304(a) (12), 2306(a)), provides in Section 4(a) that contracts to be negotiated "may be of any type which in the opinion of the agency head will promote the best interests of the government. . ." Not one syllable in that provision even hints that the agency head may negotiate a contract with a supplier of goods that incorporates a security hearing procedure for the contractor's employees inconsistent with elemental principles of due process. In fact, the promotion of "the best interests of the government," prescribed in this section, can appropriately be interpreted to mean that every aspect of the contract must

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[27] There is even grave doubt whether any sufficient basis, express or implied, exists in the enactments of Congress for the promulgation and operation of the entire Industrial Personnel Security Program. That question has been fully discussed in petitioner's brief in the *Greene* case (pp. 52 to 58) and we respectfully submit that there is no statutory foundation for the program itself. *Kent* v. *Dulles*, 357 U.S. 116. But, even if the Government should prevail in this Court in demonstrating statutory authorization or ratification of the Industrial Personnel Security Program in its general application, it cannot possibly be said that Congress has authorized so much of the program as abolishes traditional fair hearing guarantees.

be consistent with the pertinent portions of the Constitution. It need hardly be added that the promotion of the immutable principles of the Fifth Amendment is a part of the promotion of the best interests of the government.

It also has been said that the authority for the Industrial Personnel Security Review Program is Rev. Stat. § 161, 5 U.S.C. §22, which states:

> "The head of each department is authorized to prescribe regulations, *not inconsistent with law*, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it" (emphasis supplied).

But if the Regulation establishing the Industrial Security Program were promulgated under this law on the premise that it is necessary to the performance of the business of the Defense Department or to the proper preservation of the records, papers and property appertaining to it, the Regulation must avoid being "inconsistent with law." And a material part of the "law" referred to here by Congress must be taken to include the "law" of the Constitution and more particularly that of the Fifth Amendment and its requirement of a fair hearing with opportunity for confrontation and cross-examination.

Nor can a Congressional intent to authorize procedures inconsistent with the Fifth Amendment be read into the generalities of the National Security Act of 1947, 61 Stat. 499, 5 U.S.C. § 171, which created the Department of Defense and granted the Secretary of Defense and the three military Secretaries the authority to administer their departments. The same may be said of 18 U.S.C. §§ 793 and 798, making it illegal for any person having defense or classified information to disclose the same to unauthorized persons or

with intent to injure the United States. Violation of these criminal code provisions, indeed, calls for a trial with all the procedural safeguards guaranteed by the Constitution, including confrontation and cross-examination. Accordingly, if it be contended that these criminal statutes express the Congressional intent to establish an Industrial Personnel Security Review Program, they would also establish the intent that this program embody all the procedural safeguards found in the Criminal Code, including confrontation.

The conclusion is inescapable that there is nothing in the language of Congress, either express or implied, which gives the Defense Department even a shadow of purported authorization for a hearing procedure which departs from the Fifth Amendment norm. There is no provision of law which permits any suggestion that Congress intended to defy the Fifth Amendment or even to come so near thereto as to raise a serious question of constitutional law. On the contrary, expressed indications point to the desire of Congress that the Defense Department regulations shall not be inconsistent with law and shall affirmatively promote the best interests of the Government. Those indications, slight though they be, are more than enough to compel an interpretation of the power to issue the Regulation here involved only in a manner consistent with the constitutional guarantees of fair hearing.

The fact that there is no express requirement for any hearing or adjudication in any of the statutes dealing with the promulgation of Defense Department regulations does not make the impact of the foregoing interpretative process any less potent. The teaching of this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, is that the absence of an express Congressional requirement for a hearing makes the command of due process no less effective. Here the principles of due process demand that any hearing

conducted under the auspices of the Government comport with the elementary principles of fairness. That is true whether the hearing be expressly or only impliedly traceable to Congressional language.

To read into the authorization of the Industrial Personnel Security Review Program the concept of procedural due process is merely to recognize that "there cannot exist under the American flag any governmental authority untrammeled by the requirement of due process of law as guaranteed by the Constitution of the United States." *Mora* v. *Mejias*, 206 F. 2d 377, 382 (C.A. 1). By that interpolative process all serious questions of constitutional law are avoided and full effect is accorded to the petitioner's right to a due process hearing affording opportunity for confrontation and cross-examination.

Thus, while petitioner believes he has fully demonstrated that the denial of confrontation under the Defense Department Regulation violates his constitutional right to a fair hearing (see Points I, II), it becomes unnecessary for this Court to resolve that serious constitutional question since the statutory authorization for the Regulation can be interpreted so as to avoid it. On that basis, the challenged Regulation should be struck down as unauthorized by Congress.[28]

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[28] In its Brief in Opposition in the *Greene* case, the Government suggests (p. 14) that "the general power to safeguard military secrets is necessarily inherent in the duty of the executive department to preserve the security of the nation." It is not clear whether this language about safeguarding military secrets is intended to suggest that the executive department would have power to operate the Industrial Security Review Program, involving the right to private employment by millions of Americans, in the absence of Congressional authorization. At any rate, it seems clear that the executive department has no such power in the absence of Congressional action. *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579.

IV

Petitioner's Case Presents a Justiciable Controversy Which This Court Should Resolve

Petitioner's suit seeks declaratory and injunctive relief against the no-confrontation hearing procedure prescribed by the pertinent Defense Department Regulation. As petitioner pointed out in his "Opposition to Government's Suggestion of Mootness," the controversy over that procedure has not been mooted by his recent clearance since he remains subject to the continuing surveillance and operation of the security program and to the very real likelihood of renewed proceedings under the Department's unaltered "hearing" system.

Nor do the observations of the Court of Appeals in the *Greene* opinion that no justiciable controversy arises out of an attack on "the Secretary's decision on its merits" have any applicability to the instant case. The Court of Appeals there found that it could not "examine the merits of Greene's claim that he is trustworthy" and stated that "for a Court to hear de novo the evidence as to Greene's fitness to be assigned to a particular kind of confidential work would be a bootless task, involving judgments remote from the experience and competence of the judiciary." Whatever degree of applicability these observations by the Court might have had to the relief sought by Mr. Greene in his suit, they certainly have no bearing on the instant case wherein petitioner has never asked for a judicial determination of his "fitness to be assigned" to confidential work or on the "merits" of his security reliability. Whether or not these are executive determinations that courts cannot make, petitioner has in any case never asked the courts to make them.

Nor can the claim be honored that "standing to sue"

is lacking to obtain redress against the Department's unfair hearing procedure because the security clearance which is predicated upon that procedure is a mere "privilege" which the Government may withhold at will. To treat denial of clearance as involving merely denial of access to Government secrets rather than denial of the very means of livelihood is to indulge in sheer fiction. As the Court of Appeals itself observed in the *Greene* case, "as a practical matter" denial of clearance means dismissal from employment. "Security risk" is a badge of infamy to the employee which invariably produces devastating results. The Chairman of the Loyalty Review Board himself conceded that once found disloyal, "*a man is ruined everywhere and forever. No responsible employer would be likely to take a chance in giving him a job.*"[29] In like vein, the Director of the Office of Industrial Personnel Security Review has testified to the deep and devastating impact of "security risk" taint upon the future of the individual involved.[30] Thus petitioner, a highly skilled tool maker, was rendered completely unable to hold a job in his craft or indeed in any other line of work by the gratuitous badge of infamy imposed upon him under the Industrial Security Program (R. 33-34).

The Constitution is not blind to the private consequences of governmental action. *Cf. NAACP* v. *Alabama*, 357 U.S. 449; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. Vital rights of private employment, opportunity for means of livelihood and the honor and self-respect of the individual are involved in the constitutional and statutory validity of the Defense Department's unfair

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[29] "How Loyalty Program Looks to Its Boss," *Washington Star*, July 20, 1950.

[30] See Hearings on "Security and Constitutional Rights" before a Subcommittee of the Committee on the Judiciary, United States Senate, 84th Cong., 2d Sess., p. 628.

"hearing" procedure. These are tangible interests sufficient to create a justiciable controversy with respect to the validity of that procedure. See, e.g., *Harmon* v. *Brucker*, 355 U.S. 579; *Service* v. *Dulles*, 354 U.S. 363; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Cole* v. *Young*, 351 U.S. 536; *Slochower* v. *Board of Higher Education*, 350 U.S. 551; *Peters* v. *Hobby*, 349 U.S. 331; *Wieman* v. *Updegraff*, 344 U.S. 183; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; *Meyer* v. *Nebraska*, 262 U.S. 390, 399; *Truax* v. *Raich*, 239 U.S. 33; *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Cummings* v. *Missouri*, 71 U.S. 277.

Conclusion

Even more than regard for substantive freedoms, the Constitution reflects the fundamental concern of the founders, a concern bred from bitter experience with tyranny, that governmental action be preceded by and arise only out of fair procedures. Adjudication on the basis of secret and untestable accusations has traditionally been regarded as antithetical to procedural fairness; confrontation has been found an indispensable attribute of fair result not only in the criminal process but wherever interests of liberty, property or repute are in jeopardy. President Dwight D. Eisenhower has given characteristic expression to this fundamental concern in his description of Wild Bill Hickok's "Abilene code":

> "It was: meet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. If you met him face to face and took the same risks he did, you could get away with almost anything, as long as the bullet was in the front.
>
> "And today, although none of you has the great

fortune, I think, of being from Abilene, Kansas, you live after all by that same code, in your ideals and in the respect you give to certain qualities. In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." [31]

Unfortunately, as a result of fear of foreign infiltration and because of American inexperience with security problems, this nation's security programs have put a premium upon secret evidence—character assassination "from behind." They have adopted indiscriminate policies against confrontation unjustified by real or supposed security considerations.[32] As a result, millions of American citizens are today subject to a system based on secret character assassination without opportunity to defend and at the peril of a life of ruin and degradation. Estimates of the number of persons subject to the security programs have varied from 8 million (Warren, "The Law and the Future,"

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[31] Remarks on receiving America's Democratic Legacy Award on the occasion of the 40th Anniversary of the Anti-Defamation League, Press Release of November 23, 1953.

[32] It is worthy of note that the security programs do not appear to have any genuine relationship to security. Of the countless persons accused and discharged under the programs, as far as the public record is concerned, not a single one was a spy, saboteur, enemy agent or contemporaneous Communist Party member. See summaries at pp. 90-164 of the Report (No. 2750) of the Subcommittee of the Committee on Post Office and Civil Service (Johnston Committee) of the United States Senate, 84th Cong., 2d Sess., on "Administration of the Federal Employees' Security Program." On April 5, 1950, Seth Richardson, Chairman of the Loyalty Review Board, testified before a Senate Subcommittee that "not one single case of espionage" had been encountered during the three years of the loyalty program, and that the FBI had found no evidence even "directing toward espionage" in the course of its 10,000 full field investigations and its examination of three million personnel records. *N. Y. Times*, April 6, 1950, p. 1, col. 5.

Fortune Magazine, November, 1955) to as high as 20 million persons (Cain, *Strong in Their Pride and Free,* American Civil Liberties Union pamphlet, June, 1955). See also Brown, *Loyalty-Security Measures and Employment Opportunities,* 11 Bulletin of Atomic Scientists 117.

Whatever figure be accepted, the departure from constitutional requirements is truly all-pervasive. The unprecedented infringement on our constitutional tradition of fair hearing, which has its sharpest focus in petitioner's case, calls for effective judicial redress. As long as the Fifth Amendment retains its vitality, this Court cannot sanction continued operation of an arbitrary, unfair and unjustifiable governmental "hearing" system which works such profound and tragic consequences upon the lives of American citizens.

It is respectfully submitted that the judgment of the District Court be reversed with instructions to grant petitioner appropriate declaratory and injunctive relief.

Respectfully submitted,

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APPENDIX A

5 U.S.C., § 22, R.S. § 161:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

18 U.S.C., § 798:

> (a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. §§ 151-161 (41 U.S.C. (1952 ed.) 151 (c) (12), 153(a), later recodified with minor changes as 10 U.S.C. (Supp. V) 2304(a) (12), 2306(a)):

> 151(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—
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> (1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress: • • •
>
> (12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed; • • •
>
> 153 • • • Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151(c)

of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. • • •

Executive Order 10501, December 15, 1953, 18 Fed. Reg. 7049:

Safeguarding Official Information in the Interests of the Defense of the United States

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

NOW THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

• • • • •

7(b) *Dissemination Outside the Executive Branch.* Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

APPENDIX B

December 27, 1947 Statement Released by Seth W. Richardson, Chairman, Loyalty Review Board[33]

The employe will not be permitted to examine or inspect this report of the bureau, at any time, and such deprivation gives rise to one of the very controversial points involved in the operation of the entire loyalty program.

The point has been vigorously presented to us as follows. "Every employe accused of disloyalty should be given the right to confront his accusers, and subject them to cross-examination." This contention has obvious force, and presents grave considerations to us. Why have we been unable to accept it?

In nearly all cases the bureau secures the facts for inclusion in its reports from confidential sources, many of them closely connected with considerations sounding in national security. We are advised by the bureau, that in its experienced opinion, practically none of the evidential sources available will continue to be available to the bureau if proper secrecy and confidence cannot at all times be maintained with respect to the original source of information, and that if the source of such information is to be disclosed—save in exceptional cases—the bureau can be of much less service to the board in making the essential basic investigation.

In cases where sources of evidence are not confidential, and disclosure of sources, possibly with pertinent oral testimony, will not tend to hinder or impede the investigative work of the bureau, we will make every reasonable effort to extend the scope of the evidential source disclosure, to the affected employe, at the hearing. But it must be appreciated that in the great majority of the cases, we apprehend that disclosure of evidential sources to the employe, and the resulting opportunity of cross-examination of such sources by him, will probably not be practicable.

We recognize that the use of such a report as evidence by the various loyalty boards, without disclosure of the con-

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[33] The entire statement, a portion of which is here reproduced, is printed in the New York Times, December 28, 1947, at p. 28.

tents to the employe, does subject the employe to non-confrontation of witnesses against him, and does deprive him of the right of cross-examination of such witnesses—a situation which ought to, and does, give rise to the most serious questions in the minds of the general public. So serious is such a situation that it has been strongly urged upon us by responsible persons, that, rather than permit such a situation to exist, the entire loyalty program should be abandoned, even if the Government should thereupon be compelled to cease attempting to screen out disloyal employes.

We have given the matter the most careful consideration, and we can see no way in which the loyalty program may have the benefit of the skilled investigation of any competent investigative agency, and particularly of the Federal Bureau of Investigation, unless the facts received in confidence by the investigators can be kept entirely confidential at all times and under all conditions.

We were, therefore, faced with the decision whether to refuse at all times to disclose the bureau report to the employe—save in the exceptional cases noted above—or to advise the Civil Service Commission that, in our opinion the proposed loyalty program as planned should not be permitted to function.

After the most careful consideration, we have concluded that the objection to non-confrontation and no cross-examination, while important, is not essentially controlling.

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